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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

v.

HAROLD JAMES BAERT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the due process clause of the federal constitution compel a state to apply the highest state court's admittedly erroneous prior interpretation of a state statute and federal law (regarding the intent to kill as a prerequisite to the imposition of capital punishment) to a murder committed before the state court recognized and corrected its error?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW - RULE 21.1(d)	3
JURISDICTION - RULE 21.1(e)	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED - RULE 21.1(f)	5
STATEMENT OF THE CASE - RULE 21.1(g), (h)	6
REASONS FOR ALLOWANCE OF THE WRIT - RULE 21.1(j)	10
CONCLUSION	18
APPENDIX	
Opinion and judgment below	A-1
State Supreme Court's denial of review	A-12
Application for stay of remittitur and order for stay	A-13
California Penal Code section 190.2	A-15

TABLE OF AUTHORITIES

CASES	Pages
American Railway Express Co. v. Levee, 263 U.S. 19 (1923)	4
Bouie v. Columbia, 378 U.S. 347 (1964)	3, 8-10, 12-16
Carlos v. Superior Court, 35 Cal.3d 131 (1983)	2, 3, 8-12, 15, 17, 18
Darnell v. Swinney, 823 F.2d 299 (9th Cir. 1987)	17
Enmund v. Florida, 458 U.S. 782 (1982)	2
In re Baert 205 Cal.App.3d 514 (1988)	1, 3, 9-10, 13, 15
Marks v. United States, 430 U.S. 188 (1977)	3, 8-10, 12-16
Memoirs v. Massachusetts, 383 U.S. 413 (1966)	16
Michigan v. Long, 463 U.S. 1032 (1983)	1
Miller v. California, 413 U.S. 15 (1973)	15, 16

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 4

People v. Anderson, 43 Cal.3d 1104 (1987) 2, 3, 8-13, 15, 16

People v. Easter, 197 Cal.App.3d 183 (1987) 11

People v. Garcia, 36 Cal.3d 539 (1984) 11

People v. Lee, 43 Cal.3d 666 (1987) 11

People v. Malone, 47 Cal. 3d 1 (1988) 12

People v. Poggi, 45 Cal.3d 306 (1988) 11

People v. Sobiek, 30 Cal.App.3d 458 (1973) 15

United States v. Polizzi, 493 F.2d 570 (3rd Cir. 1974) 17

UNITED STATES CONSTITUTION

Article I, § 9, cl. 3 5

Article I, § 10, cl. 1 5

14th Amendment 5, 10

CALIFORNIA STATE CONSTITUTION

Article I, § 7(a) 5

Article I, § 15, cl. 7 5

Article I, § 9 5

STATUTES

UNITED STATES CODE

Title 28, Section 1257(3) 4

Title 28, Section 2403(b) 5

CALIFORNIA PENAL CODE

Section 190.2 6, 9, 11, 12, 16

Section 190.2(a)(17), (b) 2, 6, 8, 10, 12

MISCELLANEOUS

UNITED STATES SUPREME COURT RULES

Rule 17.1(c) 10

Rule 21.1(d) 3

Rule 21.1(e) 4

Rule 21.1(f)	5
Rule 21.1(g), (h)	6
Rule 21.1(j)	10
Rule 28.4(c)	5

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PETITION FOR WRIT OF CERTIORARI

The People of the State of California petition the Court for a writ of certiorari to review the judgment and opinion of the Court of Appeal for the State of California, Second Appellate District, Division Three, published as *In re Baert* 205 Cal.App.3d 514, 252 Cal.Rptr. 418 (1988). The decision of the Court of Appeal appears to rest upon federal grounds.[1]

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1. As said in *Michigan v. Long*, 463 U.S. 1032, 1040, 77 L.Ed.2d 1201, 1214, 103 S.Ct. 3469, 3476 (1983):

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

This case, therefore, involves a federal question, namely, "Does federal law now force California to apply an incorrect statutory interpretation in prosecuting an alleged murderer?"

The statute here under consideration, enacted by the voters, makes certain murderers eligible for the death penalty whether they intended to kill their victims or not.[2] Respondent Harold Baert is charged under that statute with murdering Janet McAlindon. Before she was killed, the highest state court interpreted the statute unrealistically[3] to require proof that the murderers intended to kill before they could be subjected to the death penalty. The state court did this in order to "steer[] clear of constitutional obstacles,"[4] and save the statute from possible invalidity under federal law garnered from its reading of a case of this Court[5]. However, after the alleged murder of Mrs. McAlindon, the California Supreme Court recognized it had erroneously read the federal law[6] and corrected its error of statutory construction,[7] noting, as it did so, that the statute "is not realistically susceptible of two interpretations."[8]

The question is raised, "In order to seek Baert's eligibility for the death penalty, does federal law require the prosecution to proceed under the incorrect interpretation of the statute because of the fact that the victim was killed after the Califor-

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2. CAL. PENAL CODE § 190.2(a)(17), (b); *People v. Anderson*, 43 Cal.3d 1104, 1115, 1147 (1987).

3. *Anderson*, 43 Cal.3d at 1146.

4. *Carlos v. Superior Court*, 35 Cal.3d 131, 152 (1983), overruled in *Anderson*, 43 Cal.3d at 1115, 1147.

5. *Enmund v. Florida*, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982). See *Carlos*, 35 Cal.3d at 148-151, and *Anderson*, 43 Cal.3d at 1139-1141, 1146.

6. *Anderson*, 43 Cal.3d at 1139-1140, 1146-1147.

7. *Id.* at 1147-1148, 1149-1150.

8. *Id.* at 1146.

nia Supreme Court misconstrued the statute (in *Carlos v. Superior Court*, 35 Cal.3d 131) and before the Court's announcement of its mistake (in *People v. Anderson*, 43 Cal.3d 1104)?"[9] The Court of Appeal in this case looked to this Court's opinions in *Bouie v. Columbia*, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964), and *Marks v. United States*, 430 U.S. 188, 51 L.Ed.2d 260, 97 S.Ct 990 (1977), and said, "Yes."

However, the People of the state, who by initiative enacted the provisions at issue in this case, contend otherwise. Murderers who killed during the period between announcement of the misinterpretation in one state supreme court case and its renunciation in another, and who have yet to be tried, can lawfully be punished under the plain and correct interpretation of the statute, at least in the absence of any evidence that the murderer actually relied on the incorrect interpretation in killing his victim.

OPINIONS BELOW - RULE 21.1(d)

The opinion delivered by the court below, published in the official California reports, is *In re Baert*, *supra*, 205 Cal.App.3d 514. In addition, that opinion can be found in the appendix at pages A-1 to A-11. The order of the California Supreme Court denying the petition for review of the opinion of the Court of Appeal is in the appendix at page A-12. The order of the Court of Appeal staying issuance of the remittitur is in the appendix at page A-14; see also A-14.

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9. Murderers who killed before *Carlos* or after *Anderson* do not get the benefit in California of the misconstruction of law. Thus, the issue presented in this case relates to the "window period" between *Carlos* and *Anderson*. See the discussion at page 11, *post*.

JURISDICTION - RULE 21.1(e)

The California Court of Appeal, Second Appellate District, Division Five, entered its judgment and opinion on October 26, 1988. On December 5, 1988, the People timely filed with the California Supreme Court a petition for review of the decision of the Court of Appeal. On January 19, 1989, the petition was denied.

Title 28, United States Code, section 1257(3), confers jurisdiction on the Court in this case. Even though proceedings on the merits are yet to come in the state courts, the federal issue "will not survive for this Court to review, regardless of the outcome of the proceedings on remand." *Pennsylvania v. Ritchie*, 480 U.S. 39, _-_, 94 L.Ed.2d 40, 51, 107 S.Ct. 989, 996-997 (1987). If review were denied at this point, then, should respondent Baert be convicted following trial, the People's "ability to obtain review will rest on [Baert]'s willingness to appeal." 480 U.S. at _, 94 L.Ed.2d at 52. If, on the other hand, Baert is acquitted, the People "will be barred from seeking review by the Double Jeopardy Clause. [Citations.] Therefore, if this Court does not consider the constitutional claims now, there may well be no opportunity to do so in the future." *Ibid.* Nor can the People in anyway resist the order of the Court of Appeal to preserve the issue on the hearing of a contempt citation for its prosecutor. 480 U.S. at _, 94 L.Ed.2d at 52-53, fn. 8. The order of the Court of Appeal is directed to the trial court, not the prosecution. Appendix at A-11 [205 Cal.App.3d at 523].

Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so, the time for petitioning for a writ of certiorari runs from the date of the higher court's refusal to review. *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21, 68 L.Ed. 140, 143, 44 S.Ct.

11, 12 (1923). Since filed within 60 days of the California Supreme Court's denial of review, this petition is timely.

Title 28, United States Code, section 2403(b), may be applicable. Rule 28.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED - RULE 21.1(f)

"No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST., art. I, § 9, cl. 3.

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. CONST., art. I, § 10, cl. 1.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST., amend. XIV, § 1.

"A person may not be deprived of life, liberty or property without due process of law . . . ." CAL. CONST., art. I, § 7(a).

"A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed." CAL. CONST., art. I, § 9.

"Persons may not . . . be deprived of life, liberty, or property without due process of law." CAL. CONST., art. I, § 15, cl. 7.

"The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case

in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

" . . . .

"(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

"(i) Robbery in violation of Section 211.

" . . . .

"(iii) Rape in violation of Section 261.

" . . . .

"(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs . . . (17) . . . of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true." CAL. PEN. CODE § 190.2(a)(17), (b).[10]

STATEMENT OF THE CASE - RULE 21.1(g), (h)

At a preliminary hearing held before the magistrate on October 19 and 29, 1987, the evidence tended to establish the following:[11] A coworker left Robert McAlindon's wife Janet to close up the offices of the Pomona Valley Eye Surgery Medical Group at 4:45 p.m. Friday, the 21st day of August, 1987. Ex. D, Reporter's Transcript of Oral Proceedings,

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10. The full text of section 190.2 is set forth verbatim at pages A-16 to A-20 of the appendix.

11. References to exhibits are to those filed by Baert in support of his Petition for Writ of Habeas Corpus in the Court of Appeal.

hereinafter RTP, 5, 29-30, 35-36B. About three weeks before, while canvassing the neighborhood for his employer, respondent Baert had seen Janet talking to "another nurse" in front of the medical building. *Id.* at 115. He claimed "that she was the person that he wanted to get" to fulfill his fantasies about raping a nurse and rendering a female unconscious and then having sex with her. *Id.* at 115-116. He claimed he also liked to dress in women's clothing and masturbate while so dressed. *Id.* at 123. On the 21st, when Janet came out of the medical building, Baert was waiting for her. He had hidden himself around a corner, and as Janet came around that corner, Baert threw a ligature around her neck and dragged her behind a dumpster at the rear of the building. He strangled her into unconsciousness, removed all of her clothing and raped her. *Id.* at 109-110, 117-119. When Janet regained consciousness, Baert beat her about the head and, with his palm on her forehead, bashed the back of her head onto a concrete slab, lacerating the skin covering the back of her skull. *Id.* at 8-10, 117. He then strangled her vigorously enough to kill her. *Id.* at 5-7, 117. Baert took all of her clothing and other personal belongings and fled, leaving behind only the corpse and a sheet upon which he had raped her. *Id.* at 32, 111, 112, 115. After his arrest, Baert claimed a therapeutic effect from this murder. *Id.* at 116.

On November 3, 1987, as a result of the evidence presented at the preliminary hearing, *id.* at 147-148, Baert was arraigned on, and pled not guilty to, an information filed in the Superior Court of the State of California, County of Los Angeles, charging him with the murder of Janet McAlindon. Ex. A, Information; Ex. B, minute order of Nov. 3, 1987. The information alleged, as among special circumstances making him eligible for the death penalty, that the murder was committed by Baert while he was "engaged in the commission of the crime[s] of" rape, attempted rape and robbery. Ex. A.

During proceedings prior to the attachment of jeopardy, Baert moved that the court instruct the jury at trial to decide the special circumstance allegations in accordance with the interpretation given to California Penal Code section 190.2, subdivisions (a)(17) and (b), by the State Supreme Court in the case of *Carlos v. Superior Court*, 35 Cal.3d 131, 197 Cal.Rptr. 79, 672 P.2d 862 (1983), overruled in *People v. Anderson*, 43 Cal.3d 1104, 1115, 240 Cal.Rptr. 585, 742 P.2d 1306 (1987). Ex. C, Reporter's Transcript of May 31, 1988, hereinafter RT1, 141:13-14 and 183:16-19.[12]

(In *Carlos*, the California Supreme Court doubted "that a screening device which included" accidental killers "would meet the United States Supreme Court's test" as to which cases of murder warrant the death penalty. 35 Cal.3d at 151. The state Court took its doubt as to federal constitutionality as reason to construe subdivisions (a)(17) and (b) of section 190.2, which it viewed as ambiguous, *id.* at 139-143, 147, as requiring proof of the actual killer's intent to kill in cases where death penalty eligibility was premised upon felony-based special circumstances. *Id.* at 147-153. Subsequently, the California Supreme Court overruled *Carlos* in the *Anderson* case, saying in the latter that the statute (1) is not ambiguous when "given a fair reading," 43 Cal.3d at 1143, and (2) does not require proof of intent to kill to make the actual killer eligible for the death penalty when a felony-based special circumstance exists. *Id.* at 1147.)

Baert argued in support of his jury instruction motion that, according to this Court's decisions in *Bouie v. Columbia*, 378 U.S. 347, and *Marks v. United States*, 430 U.S. 188, and because the murder of Mrs. McAlindon "occurred after the 1983 *Carlos* opinion but before the date of the decision in *People versus Anderson*, this crime being August 21st, 1987,

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12. References are to pages and lines of the reporter's transcripts contained in the exhibits.

Anderson being October 13th, 1987," RT1 142:5-13, he would be denied his right to due process, unless the trial court were to instruct the jury, as *Carlos* would have required, that the jury must find that the killing was intentional before it could return a finding of the truth of the above special circumstances. RT1 142-149.

The prosecution opposed Baert's motion, arguing that "it is not a constitutional denial of due process" to deny murderers the benefit of *Carlos*, RT1 168:10-14, and the Superior Court agreed, denying the motion and finding "that due process is not offended by the application of the *Anderson* case to this particular defendant." RT1 178:4-6. The parties agreed to interruption of the trial and a continuance, Reporter's Transcript of June 1, 1988, hereinafter RT2, at 218-221, and Baert sought review of the Superior Court's ruling by means of a petition for writ of habeas corpus filed in the Court of Appeal. In the petition, Baert continued to rely upon *Bouie* and *Marks* and argued that his "right to due process of law" as an accused, Petn. for Writ of Habeas Corpus, hereinafter HC, at 19, would be violated unless he were permitted the benefit of *Carlos*'s interpretation of section 190.2. HC at 19-21, 26. The People opposed issuance of the writ on the grounds that due process was satisfied by the notice given Baert by the special circumstances statute itself of the special punishment warranted by the murder, Return and Answer to Petn. for Writ of Habeas Corpus, hereinafter RET, at 10-11, Petn. for Rehg., hereinafter REH, at 3-4, and that the principles expressed in *Bouie* and *Marks* either were not intended to apply, RET at 11-16, or had not been shown to apply, *id.* at 14, fn. 13, REH at 2, to the circumstances of this case.

The Court of Appeal granted Baert's petition for a writ and directed the trial court "to instruct in conformance with *Carlos v. Superior Court*, 35 Cal.3d at 153-154." Appendix at A-11 [205 Cal.App.3d at 523]. In ordering the trial court to

instruct the jury on the law as stated by *Carlos* rather than *Anderson*, the Court of Appeal found "that to try [Baert] under the law now expressed in *Anderson* would create exactly the situation condemned in *Bouie* . . . ." Appendix at A-9 [205 Cal.App.3d at 517-521]. The People petitioned the California Supreme Court for review of the decision of the Court of Appeal, expressing the conclusion that extension of the ex post facto analogy of *Bouie* and *Marks* to cases such as Baert's "exalts form over substance." Petn. for Rev. at 10. The state Court denied review. Appendix at A-12.

On February 2, 1989, Appendix at A-14, and on petitioner's application, Appendix at A-14 to A-15, the Court of Appeal ordered issuance of its remittitur stayed to March 22, 1989, and thereafter, upon the timely filing of this petition, until final adjudication of the proceedings in this Court. Appendix at A-15.

REASONS FOR ALLOWANCE OF THE WRIT - RULE 21.1(j)

A court of the State of California has in this case "decided an important question of federal law which has not been, but should be, settled by this Court, ..." Rule 17.1(c). In essence, the Court of Appeal decided that the Due Process Clause of the 14th Amendment forces the state to apply an incorrect interpretation of a criminal statute, when the State Supreme Court has announced that interpretation, and, though the State Supreme Court has later corrected the interpretation, it remains uncorrected when the criminal acts.

The California Penal Code includes as special circumstances making a murderer eligible for the death penalty, those in which the murder was committed while the defendant was engaged in the commission or attempted commission of certain felonies, including robbery and rape. CAL. PEN. CODE § 190.2(a)(17), (b). In *Anderson*, 43 Cal.3d at 1147, the California Supreme Court held that "intent to kill is not an

element of the felony-murder special circumstance;" and that such intent must be proved only as to aiders and abetters and not as to the actual killer. *Id.* at 1147-1148; see also 1149-1150.

Anderson was decided on October 13, 1987, overruling the decision in *Carlos v. Superior Court*, 35 Cal.3d 131. Expressing a doubt that any other interpretation would not withstand scrutiny by this Court as a matter of federal constitutional law, *id.* at 151, *Carlos* had said that the statute, enacted by the voters by an initiative in 1978, required proof of intent to kill to sustain a finding of the truth of the felony-murder special circumstances. 35 Cal.3d at 135, 153-154. Although it was not decided until December 12, 1983, the State Supreme Court gave *Carlos* retroactive effect. *People v. Garcia*, 36 Cal.3d 539, 547-549, 205 Cal.Rptr. 265, 684 P.2d 826 (1984).[13] However, beginning with the decision in *Anderson*, the California courts have applied *Anderson*'s holding, 43 Cal.3d at 1138-1148, to murders committed before *Carlos* became final. See, e.g., *People v. Poggi*, 45 Cal.3d 306, 326-327, 246 Cal.Rptr. 886, 753 P.2d 1082 (1988), *modified* 45 Cal.3d 743c [1980 murder], *Anderson* itself, 43 Cal.3d at 1115 [1979 murder]; *People v. Easter*, 197 Cal.App.3d 183, 242 Cal.Rptr. 746 (1987). Thus, *Anderson* applies to all murders committed after passage of the 1978 death penalty law, with the possible exception, if the opinion below in this case is permitted to stand, of those committed between the time *Carlos* became final and *Anderson* was announced.

There is now no question that California statutes provide, and provided, following the enactment of section 190.2, that persons who murder in the course of certain felonies are eligible for the death penalty whether or not they intended to kill. "*Carlos* itself concluded the statute was

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13. Overruled on other grounds in *People v. Lee*, 43 Cal.3d 666, 676, 238 Cal.Rptr. 406, 738 P.2d 752 (1987).

ambiguous with respect to the requirement of intent to kill for a felony-murder special circumstance." *People v. Malone*, 47 Cal. 3d 1, 25, 252 Cal.Rptr. 525, 762 P.2d 1249 (1988), *modified* 47 Cal.3d 745a.

After *Carlos*, however, *Anderson* not only concluded that the statute was not ambiguous but that it was unreasonable to interpret the statute in such a way as to require intent to kill as an element of the felony-murder special circumstance. Read fairly, and in conjunction with subdivision (b), subdivision (a)(17) "can realistically be read only to require intent to kill for the aider and abetter but not for the actual killer." 43 Cal.3d at 1145. Since "section 190.2(a)(17) is not realistically susceptible of two interpretations," *Anderson* at 1146, *Carlos*'s interpretation of the section was unrealistic. There is no "*realistic* doubt as to the meaning of section 190.2(a)(17): the fair import of the provision is that intent is not an element of the felony-murder special circumstance." *Anderson* at 1146. *Carlos* mistakenly said the statute was ambiguous. *Anderson* at 1143. The Supreme Court recognized the mistake, and suggested (1) that *Carlos* overrode "'common sense and evident statutory purpose,'" *Anderson* at 1146, and (2) that for any murderer to be given the benefit of a doubt as to the statute's meaning would require that the murderer be given the benefit of an unreasonable doubt, *id.* at 1145-1146, something to which even a murderer is not entitled. The People of the state believe, therefore, that Baert had all the notice due process required and that he should not be presumed to have acted out his crime in reliance upon an unreasonable judicial misconstruction of what had been, and remains, a clear expression of the California electorate's will in section 190.2.

The People of the state respectfully urge that *Bouie* and *Marks* not be read as changing this, and believe that the Court of Appeal's reliance upon those cases unfairly stretches the doctrine of federal due process they announced. That

doctrine, the judicial analogy to the ex post facto prohibitions found in the United States Constitution, Art. I, §§ 9, 10, is built around the fundamental "notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties." *Marks*, 430 U.S. at 191.

Although the Court of Appeal makes reference to that notion, Appendix at A-4 [205 Cal.App.3d at 518], it aseptically removes its discussion from the facts of Baert's case and similar cases and, as a result, fails to recognize that to apply the correct interpretation of the state statute which distinguishes among the worst murderers is not unfair in this or similar cases. In attempting to justify its decision, the Court of Appeal surprisingly described the distinction between the unforeseeable judicial redefinition of the South Carolina trespass statute to encompass otherwise innocent actions of civil rights activists, in *Bouie*, and *Anderson*'s resurrection of the voters' intent in enacting the California statute punishing the worst murderers as "one of degree." Appendix at A-9 [205 Cal.App.3d at 521]. Said the Court of Appeal, as "[i]n *Bouie*, the defendants were denied the right to defend against conviction on the ground that no law penalized their conduct at the time they acted," Appendix at A-10 [205 Cal.App.3d at 522], so in this case, "application of *Anderson* would deny [Baert] the right to defend against a possible death sentence on the ground that without proof of intent the law did not categorize his conduct as a capital offense at the time he acted." Appendix at A-10 [205 Cal.App.3d at 522].

But the present situation is different from *Bouie*, both in its underlying facts, and in the nature of the judicial action taken concerning the statute in each case.

> In *Bouie* . . . , the Court reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court: '[A]n unforeseeable judicial

> enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law . . . .'

Marks, 430 U.S. at 192. The language of the trespass statute considered in *Bouie* was "'narrow and precise,' 378 U.S., at 352, and that fact was important to [this Court's] holding that the expansive construction adopted by the State Supreme Court deprived the accused of fair warning." *Marks*, 430 U.S. at 195.

Why? Because in the state case underlying *Bouie*, South Carolina authorities engrafted otherwise innocent conduct into a criminal statute, the language of which could not bear it. A conviction resulted on proof that students sat awaiting service in a booth in a drug store lunch counter during business hours after being ordered to leave. *Bouie*, 378 U.S. at 348-349. For its violation, the statute defining the trespass required, by its terms, entry after notice prohibiting entry. *Id.* at 349. The store had, however, invited the students' entry, and the students received no notice prohibiting their entry into the restaurant or booth. *Id.* at 350. On the students' appeal from their convictions, the South Carolina Supreme Court construed the trespass statute in a manner "clearly at variance with the statutory language [and without] the slightest support in prior South Carolina decisions," *id.* at 356, to include the conduct of the students in "remaining on the premises after receiving notice to leave." *Id.* at 350. This Court forbad retroactive application of the new construction to the students, *id.* at 362, because they "had no fair warning of the criminal prohibition under which" they were convicted. *Id.* at 361. "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Id.* at 354. The Court noted that application of the rule against applying the construction retroactively was "par-

ticularly compelling where . . . the []conduct cannot be deemed improper or immoral." *Id.* at 362; see also *People* v. *Sobiek*, 30 Cal.App.3d 458, 474, 106 Cal.Rptr. 519, 82 A.L.R.3d 804 (1973).

The difference between the statutory application sought by South Carolina in *Bouie* and that sought here by the People of the State of California cannot be accurately characterized, as it was by the opinion below, as merely "one of degree." Appendix at A-9 [205 Cal.App.3d at 521]. In *Bouie*, after all, the state courts extended the reach of the trespass statute far beyond its wording to sustain convictions for otherwise innocent and morally upright acts -- awaiting service in a lunch counter area, while in the instant case, the question is whether the worst of murderers should be punished *as provided by the statute* for killing people while they rape and rob them. Furthermore, it was not *Anderson* that construed the California felony-based special circumstance statute "at variance with the statutory language," 378 U.S. at 356, but *Carlos. Anderson*, 43 Cal.3d at 1145. Here it is Baert who here seeks to rely upon the misinterpretation of the statute's language, not, as in *Bouie*, the state. And that statute, construed in accordance with its language in *Anderson*, punishes conduct which can "be deemed improper or immoral" in the extreme. 378 U.S. at 362.

What does *Marks*, another case of this Court relied upon by the court below, add to this analysis? Where the *Bouie* decision rests upon an unforeseeable construction at variance with the language of a "narrow and precise" statute, the *Marks* case involved a pornography statute of "sweeping language[,]" the reach of which "necessarily ha[d] been confined within the constitutional limits announced by" this Court. *Marks*, 430 U.S. at 195. This Court noted that the 1973 *Miller*

decision[14] relaxed restrictions imposed on the prosecution of pornographers in the 1966 *Memoirs* case.[15] The defendants in *Marks*, "engaged in the dicey business of marketing films subject to possible challenge, [and] had no fair warning that their products might be subjected to the new standards," *Marks* at 195, announced in *Miller* months after their activities. The Court said it has "taken special care to insist on fair warning when a statute regulates First Amendment values[,]" that the statute involved was such a statute, and that, therefore, "in accordance with *Bouie*," the relaxed standards on prosecution in *Miller* could not retroactively apply to the defendants in *Marks*. *Marks* at 196.

Thus, in the past, this Court has not permitted retroactive effect to judicial decisions against criminal defendants (1) when a court unforeseeably construes a "narrow and precise" criminal statute at variance with its language, thereby enabling prosecution of conduct which is not "improper or immoral[,]" (in *Bouie*), and (2) when a court construes a "sweeping" statute regulating expression and necessarily depending on judicial construction for a constitutional meaning at variance with an earlier statement of the applicable law (in *Marks*). What this Court has not done is to forbid retroactive effect against criminal defendants when a court construes a "narrow and precise" criminal statute, such as the California felony-murder special circumstance, in accord with its plain language, as in *Anderson*, thereby enabling prosecution of the most "improper or immoral" conduct, as Baert's alleged conduct is, and the statute does not regulate expression or depend upon a judicial construction for a constitutional meaning, as section 190.2 does

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14. *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973).

15. *Memoirs v. Massachusetts*, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975 (1966).

not. What this Court has not yet done, however, is just what the Court of Appeal, relying on its view of federal law, did in this case.

Finally, even if there were cases in which murderers could claim that in killing they had actually relied upon a statutory interpretation by the state's highest court, so far, this is not such a case. In denying Baert's motion for *Carlos* jury instructions, the trial court found that it "could only speculate whether Mr. Baert was aware of the *Carlos* decision" and that it would have to speculate further as to whether or not, in the conduct of the murder with which he is charged, Baert's actions were "in reliance upon the interpretation of the [felony-based] special circumstances [] mentioned in the *Carlos* decision." RT1 at 175:7-12. The present case therefore does not fall within that narrow class of federal decisions suggesting that a criminal may obtain refuge from a correct interpretation of the law defining his crime and its punishment by actual reliance upon an incorrect interpretation uttered by the courts. See *Darnell v. Swinney*, 823 F.2d 299, 301 (9th Cir. 1987); also see *United States v. Polizzi*, 493 F.2d 570 (3rd Cir. 1974) (incorrect interpretation of statute might be applied to avoid injustice if defendant could establish good faith reliance in fact upon overruled decision).

CONCLUSION

Federal law does not require that murderers escape their eligibility for the death penalty when prosecuted pursuant to the clear language of a state statute which had been tarnished by an erroneous judicial opinion that misjudged federal law . In any event, as a matter of federal law, Baert has not shown that the killer of Mrs. McAlindon relied upon the State Supreme Court's error in *Carlos* and, for that additional reason, should not benefit from it.

The People of the State of California therefore respectfully pray that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

IRA REINER
District Attorney
County of Los Angeles, California

By

HARRY B. SONDHEIM
Head Deputy
Appellate Division

BRENT RIGGS
Deputy District Attorney

APPENDIX

CERTIFIED FOR PUBLICATION

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re	)	2d Crim. No. B036262
	)	(Super.Ct.No. A-886494)
HAROLD JAMES BAERT,	)	
	)	Court of Appeal -
Petitioner,	)	Second District
	)	FILED
On Habeas Corpus.	)	OCT 26 1988
	)	Robert N. Wilson Clerk
	)	
		Deputy Clerk

PETITION for writ of habeas corpus. Granted. Robert Martinez, Judge.

WILBUR F. LITTLEFIELD, Public Defender, Laurence M. Sarnoff, Alan Abajian, Henry J. Hall, Deputy Public Defenders, for Petitioner.

IRA REINER, District Attorney, Harry B. Sondheim, Brent Riggs, Deputy District Attorneys, for Respondent.

INTRODUCTION

"No one can be criminally punished in this country, except according to a law prescribed for his government by the

sovereign authority before the imputed offense was committed, and which existed as a law at the time." (*Kring* v. *Missouri* (1882) 107 U.S. 221, 235.) Guided by this fundamental principle of due process, we confront the question, not yet addressed in the wake of *People* v. *Anderson* (1978) 43 Cal.3d 1104, whether its holding eliminating intent to kill as an element of the felony-murder special circumstance (Pen. Code, § 190.2, subd. (a)(17)) may be applied retroactively to crimes committed during the period when *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131, required proof of intentionality. In our resolution, we answer that it may not.[1/]

FACTUAL AND PROCEDURAL BACKGROUND

The facts are not in dispute: Petitioner, Harold James Baert, stands accused of murder (Pen. Code, § 187), forcible rape (Pen. Code, § 261, subd. (2)), and robbery (Pen. Code, § 211). Of relevance to the matter before us, the prosecution also charged pursuant to Penal Code section 190.2, subdivision (a)(17), that he committed the murder while engaged in the commission of rape, attempted rape, and robbery. If found to be true, the special circumstance would subject petitioner to a possible death sentence. (Pen. Code, §§ 190, 190.2, subd. (a)(17).)

1/ The California Supreme Court has already determined that *People* v. *Anderson* may be applied retroactively to offenses committed prior to the finality of *Carlos* v. *Superior Court*. (See *People* v. *Poggi* (1988) 45 Cal.3d 306, 326-327; *People* v. *Gates* (1987) 43 Cal.3d 1168, 1192-1193, cert. den. *sub nom. Gates* v. *California* (1988) ___ U.S. ___, 100 L.Ed.2d 236, 108 S.Ct. 2005; see also *People* v. *Easter* (1987) 197 Cal.App.3d 183, 186.) We find nothing in our analysis or conclusion inconsistent with that determination.

The information alleged the date of the offenses as August 21, 1987. On October 13, 1987, the California Supreme Court rendered its decision in *People* v. *Anderson*, *supra*, in part overruling the holding in *Carlos* v. *Superior Court*, *supra*, requiring proof of an intentional killing to sustain a felony-murder special circumstance finding pursuant to Penal Code section 190.2, subdivision (a)(17).

Asserting that the intentionality requirement was the effective law at the time of his crimes and that the preliminary hearing testimony contained no evidence of this requisite intent, petitioner moved to strike these special circumstance allegations. (Pen. Code, § 995.) The trial court denied the motion and indicated it would not instruct the jury, consistent with *Carlos*, that intent to kill was a necessary element of the felony-murder special circumstance. After a discussion amongst the court and counsel, the parties agreed to a continuance so that petitioner could seek pretrial review of this ruling. The prosecution also desired resolution of the issue since it intended to allow petitioner to plead guilty for life imprisonment without possibility of parole if required to prove he intended to kill his victim.

Petitioner sought review by petition for writ of habeas corpus. (See Pen. Code, § 1487; *In re Berry* (1968) 68 Cal.2d 137, 145-146; *In re Bell* (1942) 19 Cal.2d 488, 492-495.) We issued an order to show cause directing the Los Angeles County District Attorney's Office to file an answer (return); and petitioner has also filed a traverse.

DISCUSSION

We begin with a brief explanation of relevant constitutional principles. Both the United States and California Constitutions forbid the enactment of ex post facto laws. (U.S. Const., art. I, §§ 9, 10; Cal. Const. art. I, § 16.) An ex post

facto law is "any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . ." (*Beazell* v. *Ohio* (1925) 269 U.S. 167, 169-170; *Bouie* v. *Columbia* (1964) 378 U.S. 347, 353.)

"The Ex Post Facto Clause is a limitation upon the powers of the legislature, [citation], and does not of its own force apply to the Judicial Branch of government. [Citation.] But the principle on which the Clause is based---the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties---is fundamental to our concept of constitutional liberty. [Citations.]" (*Marks* v. *United States* (1977) 430 U.S. 188, 191-192.) "[J]udicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness" (*Pierce* v. *United States* (1941) 314 U.S. 306, 311) and, when "applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids." (*Bouie* v. *Columbia supra*, 378 U.S. at p. 353.)

Thus, "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. [Citation.] The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' [citation], must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given

retroactive effect. [Citation.]" (*Id.*, at pp. 353-354; see *Keeler* v. *Superior Court* (1970) 2 Cal.3d 619, 631-636.)

The facts of *Bouie* v. *Columbia*, *supra*, illustrate the operation of the Due Process Clause when it results from judicial rather than legislative change in the law. In *Bouie*, black defendants were convicted under South Carolina's criminal trespass statute when they refused to leave a segregated lunch counter after being asked to do so. On its face, the statute defined as a misdemeanor "'[e]very entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry . . .'" (*id.*, at p. 349, fn.1); and no state appellate court had ever interpreted its scope other than consistent with the plain import of its terms. (*Id.*, at pp. 355-359.) Nevertheless, the South Carolina Supreme Court affirmed the convictions by "construe[ing] the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." (*Id.*, at p. 350, footnote omitted.) Finding this interpretation at variance with the statutory language and unsupported by any prior state court decisions, the United States Supreme Court reversed the convictions as violative of due process. The retroactive application of an unforeseeable judicial expansion of the law failed to provide "the fair warning to which the Constitution entitles [one]." (*Id.*, at p. 354.)

With these considerations in mind, we turn to the facts of the instant case. In *Carlos* v. *Superior Court*, *supra*, 35 Cal.3d 131, the California Supreme Court held "that the felony murder special circumstance of the 1978 [death penalty] initiative requires proof that the defendant intended to kill. Specifically, we construe the word 'intentionally' in subdivision (b) of [Penal Code] section 190.2 to apply to all defendants---actual killers and accomplices alike---and to require an intent to kill before a defendant is subject to a special circumstance

finding under paragraph 17 [of subdivision (a) of that section." (*Id.*, at pp. 153-154.) In *People* v. *Anderson*, *supra*, 43 Cal.3d 1104, the court readdressed this issue, reviewing substantially the same sources in making its redetermination. (*Id.*, at pp. 1139-1147.) However, principally in light of the United States Supreme Court's intervening decision in *Tison* v. *Arizona* (1987) 481 U.S. ___, 95 L.Ed.2d 127, 109 S.Ct. 1676, this reexamination led to an opposite conclusion: "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved before the trier of fact can find the special circumstance to be true." (*People* v. *Anderson*, *supra*, 43 Cal.3d at pp. 1138-1139.)

Unquestionably, *Anderson* effected so substantial a change in the law that retroactive application of a comparable legislative modification would be barred by the Ex Post Facto Clause. Not only does the change prescribe a greater punishment for the same conduct by subjecting the defendant to a possible death sentence without proof of an intent to kill, it also denies a crucial defense to the special circumstance allegation while concomitantly reducing the prosecution's burden of proof on that issue. (See *Lindsey* v. *Washington* (1937) 301 U.S. 397, 400-401; *Beazell* v. *Ohio*, *supra*, 269 U.S. at pp. 169-170.) Moreover, *Anderson* did not merely provide a judicial clarification of Penal Code section 190.2, subdivision (a)(17). (See *Marks* v. *United States*, *supra*, 430 U.S. at p. 194, see also, e.g., *People* v. *Sobiek* (1973) 30 Cal.App.3d 458, 472, cert. den. *sub nom. Sobiek* v. *California*, 414 U.S. 855.) The holding of *Carlos* was unambiguous and consistently applied in accord with its express language. (See *People* v. *Garcia* (1984) 36 Cal.3d 539, 548-549, cert. den. *sub nom. California* v. *Garcia* (1985) 469 U.S. 1229; see also, e.g., *People* v. *Smith* (1986) 187 Cal.App.3d 666, 684-685; *People* v. *Brown* (1985) 169 Cal.App.3d 728, 736-744, cert. den. *sub nom. Brown* v.

California (1988) ___ U.S. ___, 98 L.Ed.2d 667, 108 S.Ct. 717; *People* v. *Kelly* (1985) 163 Cal.App.3d 619, 621-622.)

We have not entered this fray without armor and note that the United States Court of Appeals applied a similar analysis in *Moore* v. *Wyrick* (8th Cir. 1985) 766 F.2d 1253, cert. den. *sub nom. Armontrout* v. *Moore* (1986) 475 U.S. 1032. There, the defendant participated in an attempted robbery that resulted in the inadvertent death of a bystander at the hands of another bystander; and he was convicted of first degree felony murder. In affirming the conviction, the Missouri Supreme Court construed the state felony murder statute to apply to the defendant's conduct even though it had previously determined otherwise under comparable facts. (*Id.*, at p. 1254.) On federal habeas corpus review, the court agreed that the decision "effected a significant change in Missouri's felony murder law as it existed [formerly] and as a result expanded the scope of the felony murder statute beyond its previous boundaries." (*Id.*, at p. 1257.) After further review the earlier state of the law, the court concluded that the change was unforeseeable and thus could not be retroactively applied to the defendant. (*Id.*, at pp. 1257-1259.)

Here, we also find a comparable consistent application of *Carlos*, which, even if short-lived, rendered the about-face in *Anderson* "an unforeseeable judicial enlargement of a criminal statute . . . ." (*Bouie* v. *Columbia*, *supra*, 378 U.S. at p. 353.) Respondent argues that, to the extent petitioner may have relied on the law as judicially interpreted, *Tison* v. *Arizona*, *supra*, should have put him on notice that *Carlos* was infirm and subject to being overruled at any time. At best this argument is based on conjectural suppositions, inferences, and conclusions. *Carlos* was decided by a six-to-one majority; and the court itself acknowledged in *Anderson* its traditional

reluctance to override the impetus of stare decisis. (*People* v. *Anderson*, *supra*, 43 Cal.3d at pp. 1138, 1147.)[2]

Moreover, we do not perceive the holding in *Tison* v. *Arizona*, *supra*, to have signaled a rapid and dramatic change in the interpretation of Penal Code section 190.2, subdivision (a)(17), with respect to the intentionality requirement. The defendants in *Tison* were aiders and abettors, and the decision principally clarified the question of whether they could be subject to the death penalty in light of *Enmund* v. *Florida* (1982) 458 U.S. 782, which held that the ultimate sanction could not be imposed against one who did not kill or attempt to kill during the course of a felony and was not present when the killing occurred. (*Id.*, at p. 801; see *Tison* v. *Arizona*, *supra*, 481 U.S. at p. ___, 95 L.Ed.2d at p. 139, 109 S.Ct. 1676.) Petitioner in this case is not charged as an aider and abettor but as the actual perpetrator of the murder. Thus, even assuming his awareness of this development in the law,

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2/ Although the precise question before us is the retroactive applicability of *Anderson*, respondent also argues at some length the superiority of the analysis in *Anderson* over that of *Carlos*, implicitly suggesting that our ultimate conclusion should be substantially influenced by that which is the "better" reasoned. However, the rationale of neither decision is before us. Moreover, holdings of the California Supreme Court constitute the ultimate and authoritative expression of state law. It is not our function or prerogative to adjudge the correctness of the court's analyses or to draw unwarranted inferences from a rapid judicial reexamination and reversal of any particular decision. Rather, it is our obligation to apply the law as so delineated to whatever facts may come before us, guided by relevant constitutional principles. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Tison hardly mandated that he anticipate an imminent reversal of *Carlos*.

Accordingly, we find that to try petitioner under the law as now expressed in *Anderson* would create exactly the situation condemned in *Bouie* v. *Columbia*, *supra*: "a statute precise on its face [as authoritatively construed by prior state supreme court interpretation] has been unforeseeably and retroactively expanded by judicial construction . . . ." (*Id.*, at p. 352.) And, in the final analysis, the law is clear: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (*Lanzetta* v. *New Jersey* (1939) 306 U.S. 451, 453.)

Respondent attempts to distinguish the underpinnings of *Bouie* v. *Columbia*, *supra*, by emphasizing that the judicial enlargement in that case criminalized conduct that was otherwise innocent. Thus, the defendants had no fair warning that, with a stroke of the state Supreme Court's pen, they would incur penal sanctions for actions they had no other reason to refrain from. Here, respondent argues, petitioner's assault on his victim, whether or not intended to result in her death, was *ab initio* societally unacceptable. (See, e.g., *People* v. *Sobiek*, *supra*, 30 Cal.App.3d at 474-476; see also *People* v. *Weidert* (1985) 39 Cal.3d at 836, 860, Lucas, J., concurring and dissenting.)

The distinction respondent draws is one of degree and does not alter our fundamental inquiry. "When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of opportunity to be heard and to defend [his] substantive right.' [Citation.] When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past

conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." (*Bouie* v. *Columbia*, *supra*, 378 U.S. at pp. 354-355.)

In *Bouie*, the defendants were denied the right to defend against conviction on the ground that no law penalized their conduct at the time they acted. Here, retroactive application of *Anderson* would deny petitioner the right to defend against a possible death sentence on the ground that without proof of intent the law did not categorize his conduct as a capital offense at the time he acted. "The Constitution forbids the application of any punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." (*Lindsey* v. *Washington*, *supra*, 301 U.S. at pp. 400-401.)

CONCLUSION

An accused may not be deprived of any defense against imposition of the state's most severe sanction if the law at the time of the crime permitted such a defense or did not prescribe death for the act committed. As Justice Holmes has said: "Although it is not likely a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." (*McBoyle* v. *United States* (1931) 283 U.S. 25, 27.) "'It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or kindred character, with those which are enumerated. . . .'" (*Bouie* v. *Columbia*, *supra*, 378 U.S. at p. 363, quoting Chief Justice Marshall in *United States* v. *Wiltber-*

ger (1820) 5 Wheat 76, 96, 5 L.Ed 37, 42; see also *Marks* v. *United States*, *supra*, 430 U.S. at pp. 194-195; *Keeler* v. *Superior Court*, *supra*, 2 Cal.3d at p. 635.)

As a humane nation, we take special care when an individual, no matter how culpable, may face the ultimate sanction of the death penalty: "There is no question that death as a punishment is unique in its severity and irrevocability. [Citations.] When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. [Citations.]" (*Gregg* v. *Georgia* (1976) 428 U.S. 153, 187.) We so observe and insure.

DISPOSITION

Petition for writ of habeas corpus is granted. The trial court is directed to instruct in conformance with Carlos v. Superior Court, supra, 35 Cal.3d at pp. 153-154.

CERTIFIED FOR PUBLICATION

ARABIAN, J.

We concur:

KLEIN, P.J.

DANIELSON, J.

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 3, No. B036262

S008144

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

Supreme Court
IN RE HAROLD JAMES BAERT **FILED**
JAN 19 1989
on Clerk

HABEAS CORPUS Deputy

Appellant's petition for review DENIED.

LUCAS
Chief Justice

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re	) No. B036262
HAROLD JAMES BAERT,	)
Petitioner,	) (LASC No.
On Habeas Corpus.	) A-886494)
	)

APPLICATION FOR STAY
OF ISSUANCE OF REMITTITUR
(IMMEDIATE STAY REQUESTED)

Court of Appeal - Second District

FILED

JAN 27 1989

Robert N. Wilson Clerk

Deputy Clerk

D O C U M E N T
CONSIDERED
GRANTED 2/2/89
DATE
Arabian
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[ss Justices]

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IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re	) No. B036262
	)
HAROLD JAMES BAERT,	) (LASC No. A-886494)
	) APPLICATION FOR
Petitioner,	) STAY OF ISSUANCE OF
	) REMITTITUR
On Habeas Corpus.	) (IMMEDIATE STAY RE-
	) QUESTED)

[TEXT OF REQUEST FOR STAY, ENDING WITH THE PRAYER:]

WHEREFORE, the People, applicant herein, respectfully request that this Honorable Court stay the issuance of the remittitur in this case until March 22, 1989, in order to permit the filing by the People of the State of California a petition for writ of certiorari with the Supreme Court of the United States, and that, upon the timely filing of such petition, said stay and order remain in force until final adjudication of the proceeding in the Supreme Court of the United States.

Respectfully submitted,
IRA REINER
District Attorney of
Los Angeles County

[signatories]

CALIFORNIA PENAL CODE SECTION 190.2

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission of the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(vii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture

requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. *(Added by § 6 of Initiative Measure approved Nov. 7, 1978.)*